Supreme Court, U.S.
FILED

94 557 SEP 23 1994

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No. 94-

In The
Supreme Court of the United States
October Term, 1994

STATE OF FLORIDA, *et al.*,

Petitioners,

vs.

SAMUEL PLATT, *et al.*; JIMMIE LEE SADDLER, *et al.*; and BRENDA ASHLEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 180 day statutory period allowed for filing administrative charges of discrimination with the EEOC was properly tolled for eight years during the pendency of an invalid and improperly certified class action brought in 1979 and vacated in 1987, under the rationale of this Court's 1974 tolling decision announced in *American Pipe and Construction Co. v. Utah*, as extended to Title VII cases by this Court's 1983 tolling decision announced in *Crown, Cork & Seal v. Parker*?

PARTIES TO THE PROCEEDING

The parties to the previous litigation in the *Griffin v. Duggar* and *Griffin v. Singletary* cases were plaintiffs Peners L. Griffin and Henry L. Dejerinett; intervenors Alvin Smith and John D. Butler; defendants below were Richard Duggar followed by Harry K. Singletary, in his official capacity as Secretary, Florida Department of Corrections; the Florida Department of Corrections; Louie L. Wainwright, individually; and Raymond W. Gearey, individually.[1]

The parties to the consolidated *Platt*, *Ashley* and *Saddler* cases now before this Court are plaintiffs Samuel Platt, Michael Anderson, Sandra Anderson, Gary Black, Nelson Brooks, Jr., Laurene Brown, Tommie Brown, Curtis Carter, Willie Clark, Julius Hope, Billy Givens, James Haynes, David Henderson, Jimmy Hodore, Mamie Jackson, Gary Jones, James McNealey, Iola Rivers, Johnnie Vance, Diane Walker, Jimmy Lee Saddler, Tom Carter, Jr., Lillie Mae Lewis, Blake T. Moore, Sr., Sylvia Jean Forward, Anthony Brown, Robert Hallback, Henry Chandler, Walter Everitt, Jr., Brenda Ashley, Bernice Hizine Atkins, Louise Baker, Gary Black, Ronald J. Baker, Sr., Nelson Brooks, Jr., Brenda Brown, Yvonne Hampton Brown, Horace Calhoun, III, David Babers, Dennis Cohen, Romeo Cozart, Cassandra Dickey, Willie Ewing, Willie Harpe, Marvin E. Jones, Mable Kilpatrick, Ronald Anthony Martin, Sylvia Anne Martin, Michael Oyefesobi, Eddie Lee Richardson, Dale Rogers, Marilyn McPherson Saucier; Sherrell R. Rosier, Eugene Shivalier, Norman Small, Dorothy Ann Solomon, Arbrea Spencer, Agness Marie Strange, Charles H. Thomas, Ruthene Tukes, and Shirley Washington; the defendants here are the State of Florida, Florida Department of Corrections and Harry K. Singletary, in his official capacity as Secretary.

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[1]Petitioners have no present quarrel with any of the adverse parties in the previous *Griffin* litigation; nor do petitioners intend to disturb any of the final judgments entered for all defendants in that litigation.

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SAMUEL PLATT, *et al.*,; JIMMIE LEE SADDLER, *et al.*; and BRENDA ASHLEY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Harry K. Singletary, Jr. and the State of Florida Department of Corrections respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this important case of first impression.

OPINIONS BELOW

The 1987 opinion and decision of the Eleventh Circuit Court of Appeals is reported at 823 F.2d 1476 (*cert. denied*, 486 U.S. 1005). The two relevant orders of the district court on remand are reproduced in the appendix to this petition at pages 1a to 11a.

The opinion of the Eleventh Circuit Court of Appeals is reported at 17 F.3d 356 (March 29, 1994). A copy is reproduced in the appendix to this petition, at pages 12a to 23a. The order denying petitioners' suggestion for rehearing *en banc* is reported at 24 F.3d 256 (May 26, 1994). A copy is reproduced in the appendix to this petition, at pages 24a to 28a. The July 21, 1994 order denying respondent's petition for panel rehearing is reproduced in the appendix at pages 29a to 32a.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals to be reviewed was entered March 29, 1994. The order denying petitioners' suggestion of *en banc* rehearing was entered May 26, 1994. The final order denying respondents' petition for panel rehearing was entered July 21, 1994. (App., *infra*, 29a)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This is a Title VII case. The federal statute involved is Title VII of the Civil Rights Act of 1964, as amended, which was made applicable to the several states on March 23, 1972, and is

presently codified at 42 U.S.C. § 2000e *et seq.* Of particular importance here is the 180 day statutory period allowed for filing administrative charges under Title VII, codified at 42 U.S.C. § 2000e-5(e). A copy of the relevant portion of the statute is reproduced in the appendix to this petition at page 34a.

STATEMENT

Following eight years of litigation, on September 23, 1987, the court of appeals correctly *vacated* the district court's order certifying a class of correctional officer applicants, because neither plaintiff (Griffin or Dejerinett) ever had Article III standing to bring the applicant testing claims, and because the intervenor Alvin Smith failed to file a timely EEOC charge and could not rely upon Griffin's 1975 EEOC charge under the "single filing rule". *Griffin v. Duggar*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988). Immediately thereafter, approximately 62 new plaintiffs (the respondents here) filed three successor class action lawsuits, which after six more years of litigation were ultimately dismissed by the district court in accordance with the 1987 mandate. The district court also dismissed the respondents' individual claims because none of them (nor anyone else) had ever filed a timely EEOC charge, and thus all "stood in no better shoes than Smith."

On March 29, 1994, the court of appeals overruled the district court, and relying primarily upon *Crown Cork & Seal v. Parker*, held that the 180 day statutory period for individuals filing *administrative* claims at EEOC was tolled for nearly eight years, during pendency of the improperly certified class action.

A. RELEVANT FACTS

The facts of this case are set forth in great detail in the first panel opinion rendered by the Eleventh Circuit in *Griffin v. Dugger*, 823 F.2d at 1479-81; and by the second panel opinion

which is the subject of this petition. (App., *infra*, 12a) However, the facts relating to the standing of each of the original named plaintiffs in *Griffin v. Duggar* are very important to a proper analysis and understanding of the controlling jurisdictional issues here, and bear repeating in some detail.

In 1971, Peners Griffin became employed by the Florida Department of Corrections as a Road Prison Officer. Beginning in 1973, he began seeking promotions to other correctional officer positions, and to several other classes of positions, as well. He was unsuccessful. In December 1974, Griffin was terminated. However, because of procedural irregularities, he was reinstated the very next day. In early 1975, Griffin was again terminated for disciplinary reasons. After a career service appeal and a state court affirmance, he was again reinstated.

Shortly thereafter, Griffin complained in-house to the department's Equal Employment Opportunity Program Office, alleging that his two dismissals were racially motivated. After an investigation, he was informed by the department's internal investigator that race had not been a factor in the personnel decisions. Griffin then filed a complaint with the Equal Employment Opportunity Commission (EEOC), detailing the events leading to his discharges. A hand-written notation on the charge, presumably made by an EEOC investigator, describes Griffin's allegations as also including "recruiting, hiring and promoting of minority groups within the Florida's Division of Adult Corrections. Specific attention within the Community Service Program". No mention was made of the entry-level correctional officer test.

Prior to completion of the EEOC investigation, without any resolution or conciliation, Griffin asked for and received a right-to-sue letter in July 1979. He thereafter initiated this lawsuit and for the first time anywhere, alleged that the use of the correctional officer entry-level exam had a detrimental impact on black applicants.

In June of 1980, the district court allowed Griffin to amend to add Henry Dejerinett as a party-plaintiff and class representative. Dejerinett had applied for a clerical position with the FDOC as property manager III in 1978, and had not been hired. A test was not required in order to be eligible for this position. Dejerinett complained to the EEOC and was given his right-to-sue letter upon request in March 1980; again, there was no EEOC investigation nor any substantive resolution at the administrative level.

In March 1981, the lower court preliminarily certified a class, with Griffin and Dejerinett representing "all past, present, and potential black employees of the State of Florida Department of Corrections". When defendants moved to have the across-the-board class vacated in July 1982, plaintiffs sought leave to allow Alvin Smith to intervene. Smith had applied for correctional officer jobs in 1980 and 1981, but was originally not hired because he lacked a high school diploma or its equivalent. After he later obtained a general equivalency diploma (GED), he sought employment in July 1981, as an entry-level correctional officer. This time Smith failed the written exam and was once again denied employment. Smith never filed a timely charge of discrimination with the EEOC challenging these employment denials, but was allowed to intervene based on the lower court's belief that he was excused from doing so by the single-filing rule, merely because Griffin's 1975 charge had mentioned a hiring claim.[2]

The merits of the correctional officer test have never been litigated anywhere. The defendants repeatedly refused to litigate the testing issue because from the beginning they believed Griffin and Dejerinett lacked standing to raise it, and because plaintiffs repeatedly relied on Griffin's 1975 EEOC charge to avoid filing a valid timely charge on the testing claim.

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[2]Smith did attempt to file an EEOC charge in 1982 at the same time he sought to intervene; but because he was complaining of being denied a job in July 1981, his claim was dismissed by the EEOC for lack of jurisdiction (untimely filed).

The various versions (three) of the correctional officer test at issue in this case were no longer given after August of 1982, shortly after the lower court granted plaintiffs a partial summary judgment on the issue. Consequently, no one with Article III standing has ever filed a timely EEOC charge about the test.

As the Eleventh Circuit noted in the panel decision subject to this petition, the twenty *Platt* plaintiffs each have relied upon a charge challenging the test filed in March 1986 by Samuel Platt; the nine plaintiffs in *Saddler* have relied upon a 1987 EEOC charge filed by plaintiff Henry Chandler; and the thirty-three plaintiffs in *Ashley* each claim to have filed an EEOC charge sometime after the September 1987 *Griffin v. Dugger* decision vacating the class. *See*, App., *infra*, 17a, 18a.

B. Proceedings Below

Plaintiff Peners Griffin initiated this Title VII race discrimination action against the Florida Department of Corrections (FDOC) and others in October 1979, seeking to litigate an "across-the-board" class action on behalf of all past, present and potential black employees of the state agency. His complaint made bare allegations of discrimination in recruiting, hiring, assignment of jobs and promotions; by maintaining a racially biased workplace; and by requiring that applicants for correctional officer have a high school diploma and pass a written exam, both of which statutory requirements were alleged to have a disparate impact on blacks.

In 1980, the district court allowed Griffin to amend his complaint, adding Henry Dejerinett, a clerical applicant, as a plaintiff and class representative; thereafter, in 1981 the court preliminary certified a class, based upon a stipulation preserving defendants' rights to challenge the plaintiffs' standing.

In 1982, shortly after this Court's opinion in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), the defendants moved to vacate the class certification. Plaintiffs sought leave to

allow Alvin Smith to intervene as the third named plaintiff and as an additional class representative. The district court, in allowing Alvin Smith's intervention, denied defendants' motion to vacate the class. Two days later the court granted a partial summary judgment for the plaintiffs, holding that the entry-level written exam given applicants for correctional officer had a disparate impact on the class that was not justified by business necessity.

Beginning in August 1982, trial was held over a five-week period on the remaining class and individual claims.[3] A year later the district court ruled for the defendants on each of those remaining claims, and entered judgment accordingly. The parties agreed to begin the notice process for class members regarding the testing issue for which preliminary liability had been found. Thereafter, in 1985 the Eleventh Circuit allowed an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b), to review the lower court's decision allowing Griffin, Dejerinett and Smith to serve as named plaintiffs for a class that included correctional officer applicants with testing claims. The Eleventh Circuit vacated the district court's order. *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005 (188).

The Eleventh Circuit found that neither Griffin nor Dejerinett ever had Article III standing to assert a testing claim, and also held that Smith had erroneously been allowed to intervene as a class representative for purposes of that claim because he had failed to file a timely charge of discrimination with the EEOC, as required by 42 U.S.C. Section 2000e-5(e). A petition for writ of certiorari filed by the plaintiffs (raising the same tolling issues presented here) was denied by this Court in 1988.

Upon remand to the lower court, several things happened. Ultimately, motions to intervene filed by additional parties were denied; plaintiffs' motions to amend the complaint and retry the

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[3]Griffin's individual due process, equal protection and pendent state claims were not tried; after remand, those claims were voluntarily dismissed.

claim were denied; the 1982 partial summary judgment order on the class testing issue was vacated; plaintiffs' other individual claims were dismissed; and final judgment for the defendants was eventually entered in the *Griffin* case.

However, beginning soon after the remand, several new groups of plaintiffs, all purportedly affected by the defendants' use of the correctional officer test, filed three new class actions -- the *Platt* case involving some twenty plaintiffs; the *Saddler* action involving nine plaintiffs; and the *Ashley* case naming some thirty-three plaintiffs. In each of these cases, the plaintiffs attempted to rely upon the single-filing rule and tolling principles to excuse their failure to file timely EEOC charges; and each group sought to have a testing class certified. Defendants moved to strike the class allegations in each of these cases, and the motions were granted. Thereafter, all actions were consolidated and summary judgment was entered for the defendants upon the district court's finding that tolling was not applicable to the EEOC administrative charge-filing period, and because no named plaintiff had ever filed a timely charge.

In the second appeal, the *Griffin* rulings (appeal numbers 92-9000 and 92-2163) and the *Platt* rulings (appeal number 92-2996) were consolidated, and have now resulted in the second panel opinion dated March 29, 1994. The Eleventh Circuit panel affirmed each order entered below except the district court's finding regarding tolling. The panel held that the tolling principle announced in *Crown, Cork & Seal v. Parker* -- which allows for tolling of the 90 day period in which to file *a separate lawsuit* in federal court -- also applied to the statutory 180 day charge-filing period for filing administrative claims at EEOC. The specific holdings of the panel decision at issue here are reproduced in the appendix to this petition, at pages 20a to 23a.

On May 26 and July 21, 1994, respectively, the Eleventh Circuit Court of Appeals denied the petitioners' suggestion of rehearing *en banc*, and denied the respondents' petition for panel rehearing.

REASONS FOR GRANTING THE PETITION

This is an issue of first impression in this Court. The panel decision below adversely affects the administration of justice in the federal courts, and proves out the wisdom and warning sounded by Justice Powell, Chief Justice Rehnquist and Justice O'Conner, expressed in their concurring opinion in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983): "The tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354. Unless this Court now intercedes and vacates the recent panel opinion below, the law of class action tolling in the Eleventh Circuit will allow and may even encourage the kind of abuse forewarned.

Petitioners respectfully submit that this Court's review is necessary in this action because part II (B) of the panel decision, extending the "generous" tolling principles of *American Pipe & Construction Co. v. Utah*, 414 U.S. (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), to greatly expand the 180 day statutory EEOC administrative charge-filing period, is not authorized by those or any other cases. The decision below also ignores the jurisdictional facts and law of this case as set forth in the prior panel opinion of *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988).

The panel's mistaken view below can be traced to a misunderstanding of the fundamental principles of law upon which this Court's tolling decisions are grounded. In *American Pipe*, this Court "granted certiorari to consider a seemingly important question affecting the administration of justice in the federal courts." 414 U.S. at 545. That question was whether the federal courts could (or should) enlarge the congressional statutes of limitations governing access to the federal courts, by allowing putative class members to await the outcome of procedural decisions affecting the viability and continued use of the class action device prior to intervening or bringing separate cases.

This Court, taking great pain to review, analyze and explain the unique circumstances involved in *American Pipe*, discussed the reasons for and historical deference given by the federal courts to congressional statutes of limitations, discussed the limits of judicial power to alter statutes of limitations, and created a delicate balancing test which must be followed in each specific instance. Perhaps the most fundamental consideration given by this Court in allowing tolling was "whether tolling the limitation in a given context is consonant with the legislative scheme." 414 U.S. at 557, 558. However, as is apparent by the panel decision here at issue, that important condition has since been swallowed by the simple rule.

This Court held that the filing of a class action suspends the applicable statute of limitations as to all the members of the class who would have been parties if the class action suit had been allowed to continue. The apparent simplicity of the *American Pipe* rule has misled many federal courts ever since. Confusion exists below primarily because the rule is often applied much more broadly than sanctioned by the rationale underlying the rule. Many federal courts are too quick to apply the boilerplate of the rule without reading the illustrative opinion and considering the importance of the fundamental conditions upon which the rule is based. That is what occurred here.

A close reading of *American Pipe* will support the petitioners' view that the tolling rule does not apply to spurious class actions brought by plaintiffs who lack Article III standing to bring the class claims. Perhaps former Chief Justice Burger said it best: "Standing cannot be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802 at 829 (1974) (BURGER, CJ, concurring); *Brown v. Sibley*, 650 F.2d 760 at 771 (5th Cir. 1981). In *American Pipe*, the Ninth Circuit and this Court both observed that the class action filed by Utah was itself timely filed (by eleven days), was an issue properly brought by representatives having standing to sue, and that the class action device was denied solely because of an apparent lack of numerosity, not lack of jurisdiction. 414 U.S. at 552, 553. The

appellate court had carefully distinguished the several differing reasons for denial of class certification, 473 F.2d at 584, and this Court apparently agreed. 414 U.S. at 553. However, Justice Blackmun's concurring opinion was prophetic in warning the federal courts about the inherent dangers sure to arise in application of the rule:

> Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.

414 U.S. at 561.

Nine years later Justice Powell was joined by Chief Justice Rehnquist and Justice O'Connor, concurring in this Court's decision extending the *American Pipe* rule to the filing of new lawsuits, in *Crown, Cork & Seal Company v. Parker*, 462 U.S. 345 (1983). Together they reiterated Justice Blackmun's warning expressed in *American Pipe*, observing that "(t)he tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354.

While citing to *American Pipe* and *Crown, Cork & Seal*, and by referring to the issue as one of equitable tolling, the recent panel's opinion has misunderstood or completely ignored the prior panel's holdings and discussion of the single-filing rule; ignored the reasons and justifications for that rule; ignored the interplay between the single-filing rule and tolling principles; and, importantly, has ignored the distinction between *vacation* of an improvidently granted class certification, as occurred in *Griffin v. Dugger*, confusing it with subsequent "decertification" or "denial

of certification" of a proper class, as occurred in those cases cited by the panel to support its decision.

Petitioners do not believe this Court ever intended to allow the carefully crafted judicial action tolling principles set forth in *American Pipe* and *Crown, Cork & Seal*, to be extended and used to toll the time for filing of administrative EEOC charges; indeed, based upon the facts as previously found and law of this case, petitioners respectfully submit that it is particularly *inappropriate* to do so in this case. As the 1987 panel stated in discussing the threshold issues,

> the legitimacy of a private Title VII suit brought on behalf of a class depends on the satisfaction of two distinct prerequisites. First, there must be an individual plaintiff with a cognizable claim, that is, an individual who has constitutional standing to raise the claim (or claims) and who has satisfied the procedural requirements of Title VII. Second, the requirements of Rule 23 of the Federal Rules of Civil Procedure must be fulfilled . . .

823 F.2d at 1482. The 1987 panel went on to find that neither Griffin nor Dejerinett ever had the constitutional standing to assert a testing claim, either individually or on behalf of a purported class. *Id.* at 1484, 1490-91, and 1492.

The original *Griffin* panel then looked to see if intervenor Smith, by virtue of the single-filing rule first announced by the Fifth Circuit in *Oatis v. Crown Zellarbach Corp.*, 398 F.2d 496, 498-99 (5th Cir. 1968), could boot-strap his way into the suit in order to represent a testing class. The 1987 panel explained that "the 'single-filing rule' contains two essential requirements: 'First, at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective . . . . (and) Second, the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame.'" *Id.*

at 1492, quoting *Jackson v. Seaboard Coastline R.R.*, 678 F.2d 992, 1011-12 (11th Cir. 1982).

The original panel found that the first requirement had been met, holding that Griffin had "timely filed an adequate EEOC complaint, as far as it detailed his promotion and discipline claims." *Griffin v. Dugger*, 823 F.2d at 1493. However, the second requirement was not met because Smith, the non-filing plaintiff, had asserted an objective testing claim, while Griffin had asserted subjective promotion and discipline claims. Thus, the original panel held that "employee Griffin's claims and applicant Smith's claims did not arise out of similar discriminatory treatment," and Smith was not allowed to rely upon the single-filing rule. *Id.*; *see also Hill v. MARTA*, 841 F.2d 1533, 1545 (11th Cir. 1988) (a charge against discriminatory hiring policy would not support claims for discriminatory hiring before policy adopted); *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376, 1381 (11th Cir. 1983)(charge for discriminatory discharge would not support claims by a non-filing plaintiff who was alleging discriminatory testing); and *see Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1201 (5th Cir. 1984)(former employees seeking to intervene in class action but who had not filed timely charges with EEOC could only proceed within periphery of issues that the named plaintiffs could properly assert), *cert. denied*, 469 U.S. 1073 (1984).

The Eleventh Circuit has also held that the application of the single filing rule

> . . .has been grounded in the purpose of the EEOC charge requirement 'that the settlement of grievances be first attempted through the office of the EEOC.' *Oatis, supra,* 398 F.2d at 498. By requiring that the relied upon charge be otherwise valid, and that the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame, *we have ensured that no plaintiff be permitted to*

> *bring suit until the EEOC has been given the opportunity to address the grievance.*

Calloway v. Partners National Health Plans, 986 F.2d 446, 450 (11th Cir. 1993)*(emphasis supplied)*. Other circuits have recognized the need for someone to file a valid timely EEOC charge and thereby allow the administrative scheme to work prior to going to court. *See Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981)(Where two claims are so similar that "no conciliatory purpose" would be served by filing separate EEOC charges, then it would be 'wasteful, if not vain,' to require separate filings; but where complaints differ to the extent that "there is a real possibility that one claim might be administratively settled while the other can be resolved only by the courts," the rationale does not apply and separate filings should be required "to effectuate the purpose of Title VII's provisions for administrative relief".); *Oatis*, *supra*, 398 F.2d at 498 ("It would be wasteful, if not vain, for numerous employees, all with the *same grievance*, to have to process many *identical* complaints with EEOC.")

The recent panel opinion seemed to recognize the general purpose behind a single-filing concept, *i.e.*, that reliance upon the valid charge of one would discourage the proliferation of multiple charges, while still putting the defendants on notice; but this recognition was erroneously used to extend the holding of *Crown, Cork & Seal*, which clearly only applies to subsequent *lawsuits*, not to EEOC charges. Therefore, petitioners submit that the later panel missed the very crux of the rationale behind the judicial single-filing rule and confused its relationship to the charge-filing requirement of Title VII.

Petitioners believe that the statute is a remedial one in which Congress has mandated that a claim first be presented by someone to the EEOC, for the opportunity to be addressed and resolved administratively prior to going to court. In this case, *no individual ever filed a timely charge of discrimination with the EEOC raising his or her own individual testing claim.* Consequently, the EEOC never saw any of the tests challenged,

and the petitioners never had any opportunity to defend the merits of the test, or even to conciliate at EEOC. The recent panel opinion will allow (and may in fact encourage) people without valid claims to file spurious class actions on behalf of others who may have valid EEOC claims, but who want to ignore Title VII's remedial requirements entirely, knowing that they can always file late charges if the class claims are defeated (or even *vacated*) many years later.

The cases cited by the recent panel to support its decision to extend *Crown, Cork & Seal* tolling and add eight years to the EEOC administrative charge-filing period are misplaced. In each of those cases cited, at least one named plaintiff had properly exhausted his administrative remedies and, along with others who had not, was merely awaiting the results of a ruling on class certification or class liability in an otherwise properly pleaded class action suit.[4] Thus, in realty, each of the cases cited by the recent panel to support its extension of the tolling principle did so by observing and making use of the single-filing rule.

In *Sharpe v. American Express Co.*, 689 F.Supp. 294 (S.D. N.Y. 1988), the Southern District of New York, in ruling on a motion for summary judgment concerning the charge-filing statute of limitations period, found an extension of *Crown, Cork & Seal* tolling to be appropriate in that case. However, the district court really did nothing more than apply the single-filing rule:

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[4]Indeed, even in *Crown, Cork & Seal v. Parker, supra,* and *Edwards v. Boeing Vertol Co.*, 717 F.2d 761 (3rd Cir. 1983), *vacated on other grounds*, 468 U.S. 1201 (1984), *reinstated*, 750 F.2d 13 (3rd Cir. 1984), the two main case-filing tolling cases cited by the panel to support its extension, both plaintiff Parker in *Crown, Cork & Seal* and the plaintiff in *Edwards* had filed charges, had received right-to-sue letters during the pendency of the class actions, and were then allowed to pursue individual claims after class certification was denied or class claims were defeated, well after the 90-day case-filing requirement of 42 U.S.C. Section 2000e-5(f)(1).

> Defendant's argument that application of the tolling rule in this case would stymie the salutary purposes of the EEOC filing requirement, namely triggering of investigatory and conciliatory procedures, rings hollow since *application of the toll is contingent on the existence of a class action asserting identical or similar claims. The class representatives will necessarily have brought the claims to the EEOC prior to the filing of the class action, and the conciliatory mechanisms will already have been in place at the time a plaintiff seeks to assert a toll.*

689 F.Supp. at 300-301 (emphasis supplied). The New York district court then cited to a number of cases supporting its position, all of which set out the requirements of the single-filing rule. *Id., citing Lo Re v. Chase Manhattan Corp.*, 431 F.Supp. 189, 194 (S.D. N.Y. 1977)(when at least two plaintiffs had *properly* initiated a class action, others need not have filed EEOC claims in order to join); *Foster v. Gueroy, supra* (joinder of co-plaintiffs who had not filed with EEOC allowed where claims were so similar to those who had filed that no conciliatory purpose would be served in requiring separate filing); and *Jackson v. Seaboard Coastline R.R., supra* (laying out the essential requirements in order to make use of the single-filing rule).

Then addressing the single-filing rule's applicability to the case at hand, the New York district court specifically noted that the "class representatives filed complaints with the EEOC prior to the filing of the class action," 689 F.Supp. at 301; that "Sharpe's complaint asserts essentially similar allegations to those made in the class complaint," *Id.*; and that his complaint arose "out of the same general time frame as that of plaintiffs in the class action". *Id.* at 302.

With all due respect, these carefully analyzed factual details made by the New York district court clearly make that case inapposite to the factual situation before the panel below. The

recent panel decision is not supported by the decision of the New York district court in *Sharpe v. American Express Co.*. Under the law of this case, respondents here have not and cannot meet the single-filing rule requirements, and there is no valid basis to toll the administrative charge-filing period in this case.

So, too, are the cases of *McDonald v. Secretary of Health and Human Services*, 834 F.2d 1085 (1st Cir. 1987), and *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), cited by the panel to support its extension, inapposite. In *Andrews* there is no discussion of whether any plaintiff in the prior class actions involved in that case had properly exhausted; but petitioners suggest that it must be presumed that at least one had, because the appellate court noted that "defendant conceded, at least implicitly, that time limits for filing individual administrative complaints were tolled during the pendency of the class action . . . ." 851 F.2d at 148. (Petitioners have not conceded that issue here.)

It is also of critical importance to note that *McDonald* was a non-Title VII case involving a different administrative exhaustion requirement under two federal social security disability programs. The court's holding there related to tolling of a second internal administrative step of the exhaustion requirements -- the very step which was the subject of that litigation. The McDonald court merely held that, subsequent to a determination of the legality of the use of that Step 2 process, those persons with claims that "lay dormant *in the administrative pipeline* during the pendency of this case . . . [could] go forward from the point where they had left off". 851 F.2d at 1086, 1092 (emphasis supplied).

But most importantly, in *McDonald* the First Circuit grounded its decision in part upon finding that (in its previous opinion) "we did not rule that the class was *improperly* certified. The court below and the parties were therefore entitled to assume that *we did not question the court's jurisdiction over the class members*". *Id.* at 1091 (emphasis supplied).

Again, with all due respect, these are very important distinctions which the panel in this action either overlooked or failed to recognize. In *Griffin v. Dugger*, the district court's erroneous class certification was *vacated* for jurisdictional reasons; it was not simply "denied" or "decertified". The prior panel in this case specifically found that plaintiffs Griffin and Dejerinett lacked Article III standing to raise the testing claims; thus the district court lacked jurisdiction to hear a class testing claim.

By its vacation of the class certification on jurisdictional grounds, the prior panel has undercut the later panel's authority to utilize either equitable tolling or single-filing principles, because "to vacate a judgment 'is to take away from it any precedential effect' . . . In essence, when a judgment is vacated 'all is effectually extinguished.'" *Falcon v. General Telephone Co.*, 815 F.2d 317 (5th Cir. 1987) (citations to some 1966 and 1968 Fifth Circuit cases omitted). Consequently, as a matter of law there never was a class action, because there never was a plaintiff or intervenor properly before the district court to raise or preserve the testing claim, whether through equitable tolling or by making use of the single-filing rule. Thus it is respectfully submitted that the decision of the later panel cannot stand.

Petitioners respectfully disagree with the recent panel's decision extending the "generous" tolling principles of *American Pipe* and *Crown, Cork & Seal* because it acts to encourage or excuse the respondents' repeated lack of diligence. Any of these respondents could easily have filed a charge of discrimination within 180 days of failing the test; but no one ever did. If respondents were relying upon the *Griffin* class action as they say, then they must have known that defendants were repeatedly challenging Mr. Griffin's standing; and they must have known that Alvin Smith's charge was untimely filed; and they must have known that defendants would appeal these jurisdictional issues; but still no one ever filed a timely charge.

This case does not warrant the extension of the *Crown, Cork & Seal* principles of tolling. Plaintiffs and intervenors have

been represented, throughout, by the same experienced counsel, and they have known, through the defenses asserted from the very beginning of this case, that there were potential jurisdictional problems with their testing claim. As this Court has noted in a somewhat similar situation:

> The simple fact is that [petitioner] was told three times what she must do to preserve her claims, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.
>
> * * *
>
> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 65 L.Ed.2d 532, 100 S.Ct. 2486 (1980), in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151-52 (1984).

Petitioners do not wish to suggest that some reasonable extension of the *Crown, Cork & Seal* tolling principles to include tolling of the EEOC administrative charge-filing period might *never* be appropriate. In a properly pleaded class action suit where at least one named plaintiff or intervenor has exhausted administrative remedies by filing a timely charge which is not otherwise defective, and which raises claims similar in both time and nature to those of non-filing members of a class, both the legislative purposes of the Title VII notice and the chance of administrative resolution of claims as well as the procedural

purposes of promoting judicial economy and efficiency inherent in the class action procedure might well be served. Indeed, that is the rationale behind and purpose of the single-filing rule.

However, to let stand the recent panel decision which, as a matter of first impression, extends the principle of tolling in this case would be a grave mistake. Neither the facts of this case nor the law already established by the prior panel opinion will allow its extension, whether under tolling or single-filing principles. Petitioners therefore respectfully suggest that this matter be taken up by this petition, that the panel decision be vacated, and that the judgments of the district court be affirmed in all respects.

———— ○ ————

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1994

APPENDIX

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SAMUEL PLATT, et al.,
individually and on behalf
of all others similarly
situated,

Plaintiffs,

v. TCA 88-40035-WS

THE STATE OF FLORIDA; THE
FLORIDA DEPARTMENT OF CORRECTIONS;
and HARRY K. SINGLETARY, JR., in
his official capacity as Secretary
of the Florida Department of
Corrections,

Defendants.
_____/

ORDER DENYING CLASS CERTIFICATION

Before the court is Plaintiffs' Motion to Certify Class (document 12). Defendants have responded with a Motion to Deny Plaintiffs' 'Motion to Certify Class,' to Strike All Class Allegations from the Complaint, and to Dismiss All Class Claims from This Case (document 69). Plaintiffs have responded in opposition to Defendants' motion. *See* document 76.

Issues identical to the ones raised here were raised in a related case, *Saddler v. State of Florida*, Case No. 90-40129-WS. Oral argument on such issues was held on January 27, 1992. At the *Saddler* oral argument, the parties indicated that they would file a consented motion to consolidate this case and another related case, *Ashley v. State of Florida*, Case No. 91-40333-WS, with the

Saddler case so that all class-related motions could be considered together. To date, no motion to consolidate has been filed.

At oral argument, the lawyers also requested, and were given, thirty days to file supplemental briefs on the relevant issues of law. Because the lawyers neither requested an extension of time nor filed their briefs within the prescribed time period, the court assumed that the matter relating to class claims was ripe for decision. Accordingly, in the *Saddler* case, an order dismissing all class claims is being entered today, March 20, 1992.

In this case, the court has reviewed the record and has determined that all class claims must be dismissed just as they were in the *Saddler* case. The reasons for such decision were explained in the *Saddler* order, pertinent portions of which are repeated below.

I. BACKGROUND

Plaintiffs challenge the now-discontinued examination that Defendants used for many years as an employment screening device. Based on their examination scores, Plaintiffs were long ago denied employment as correctional officers. Suing both as individuals and as representatives of a class of similarly situated persons, Plaintiffs filed their complaint after the Eleventh Circuit eliminated any possibility that their claims would be litigated in a separate but related class action lawsuit. *See Griffin v. Dugger*, 832 F.2d 1476 (11th Cir. 1987)(vacating class certification order), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988).

The predecessor class action began in the fall of 1979 when Peners L. Griffin filed suit in this court, challenging a number of Defendants' employment practices, including use of a written entry-level examination for correctional officers. Employed as a correctional officer himself, Griffin filed his complaint after receiving a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). Griffin defined

a broad-based class including "all past, present and potential black employees of the State of Florida Department of Corrections." *See* document 54.

Alvin Smith later intervened in Griffin's action as an additional named plaintiff and class representative. Unlike Griffin, but like all of the Plaintiffs in the instant action, Smith applied for a position as correctional officer, failed the written entry-level examination, and was not hired. Unlike Griffin, Smith did not file charges with the EEOC in a timely manner.

This court ultimately certified Griffin's case as a class action. Consistent with the allegations in Griffin's complaint, the certified class included "all past, present, and potential black employees of the State of Florida Department of Corrections." *See* documents 84 & 150. As defined, the class clearly included all Plaintiffs in the case now before the court.

Claiming that certification of the class in *Griffin* was improper under *General Telephone Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)(reversing a former Fifth Circuit decision permitting "across-the-board" class actions), Defendants sought leave to appeal the decision permitting Griffin and Smith to serve as named plaintiffs for a class that included applicants with testing claims. The Eleventh Circuit granted the appeal pursuant to 28 U.S.C. § 1292(b), concluded that this court incorrectly applied the dictates of *Falcon*, and vacated the order certifying the class. *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988). More particularly, the Eleventh Circuit held that neither Griffin nor Smith could represent the class of black correctional officer applicants with testing claims. The court said that: (1) Griffin, who as an employee could assert discipline and promotion claims under Title VII, did not have representative capacity to assert testing claims on behalf of persons who were denied employment; and (2) Smith, who as a rejected applicant could assert testing claims, did not file a timely charge of racial

discrimination with the EEOC, a necessary precondition to the filing of a Title VII suit.

The Eleventh Circuit concluded that Smith, who allegedly filed a charge with the EEOC approximately one year after he failed the correctional officer examination, could not rely on the timely charge filed by Griffin because the alleged discriminatory treatment suffered by each was different. The court cited *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99 (5th Cir. 1968), which held that it is not necessary for each person with the same grievance to file an EEOC charge as a prerequisite to class membership if: (1) at least one plaintiff has filed an EEOC complaint that is not otherwise defective; and (2) the individual claims of the filing and non-filing plaintiffs have arisen out of similar discriminatory treatment in the same time frame. As the court in *Oatis* said: "Once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of person similarly situated." 398 F.2d at 498 (emphasis added). Because Griffin complained of purely subjective promotional and disciplinary practices while Smith complained of objective hiring practices, the court said Smith failed to satisfy the second requirement of the "single-filing rule." Importantly, the Eleventh Circuit would not excuse Smith's failure to file a timely EEOC charge even though Griffin's EEOC charge arguably contained a testing claim brought on behalf of others, even though Smith was a member of a putative class named in Griffin's complaint, and even though Defendants' use of the examination continued past the time when Smith was denied employment. In short, the Eleventh Circuit rejected any notion that Smith should be allowed to represent a class of black correctional officer applicants with testing claims.

Like Smith, each of the Plaintiffs in this case was denied employment as a correctional officer many years ago. Undoubtedly, because use of the exam was discontinued in 1982, no Plaintiff took and failed the examination any later than the fall of 1982. Yet none of the Plaintiffs filed a charge with the EEOC, or the state deferral agency, until long after he or she failed the

examination. Indeed, in each case, the charge was filed well beyond the prescribed 300-day period for filing charges with the EEOC. Not unexpectedly, Defendants point to this tardiness in their motion to strike all class allegations from Plaintiffs' complaint.

II. DISCUSSION

As mentioned previously, Plaintiffs sue not only in their individual capacities but also as representatives of all other persons similarly situated. Defendants maintain that Plaintiffs cannot serve as class representatives because class action certification is no more appropriate here than it was in *Griffin*. Finding Defendants' arguments persuasive, this court is convinced that Plaintiffs in this case stand in no better shoes than did Alvin Smith in *Griffin*. Just like Smith, each Plaintiff filed a charge with the EEOC long after the applicable 300-day filing period expired. Just like Smith, each Plaintiff should not be permitted to rely upon the timely charge filed by a person who, like Griffin, did not have standing to raise the claims asserted by Plaintiffs. Just like Smith, Plaintiffs should not have their tardiness forgiven because they were members of the putative class named in Griffin's complaint. Just like Smith, these Plaintiffs should not be permitted to assert class-wide hiring claims.

Relying on *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed. 2d 713 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983), Plaintiffs suggest that the EEOC limitations period was tolled during the pendency of the *Griffin* case. They maintain that, by filing their EEOC charges within 300 days of the day the Eleventh Circuit vacated the class certification order in *Griffin*, they satisfied the Title VII limitations period. They thus insist that their filing was timely. Furthermore, they contend that the decision in *Griffin* forecloses neither their tolling argument nor their present action because the Eleventh Circuit failed to address the tolling issue in *Griffin*. This court finds Plaintiffs' contentions

unconvincing, largely because neither *American Pipe* nor *Crown, Cork & Seal* applies to the facts of this case.

In *American Pipe*, the Supreme Court held that the commencement of a class suit may toll the running of a statute of limitations for all purported members of the class who make timely motions to intervene after the court has refused to certify the class. The Court was careful to note that maintenance of the class action in *American Pipe* was denied for failure to demonstrate numerosity and not for failure to state a claim, or for lack of standing of the representative, or for reasons of bad faith or frivolity. 76 L.Ed.2d at 726. As the Court explained: "The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights' are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 76 L.Ed.2d at 727 (cite omitted, emphasis added). In no way did the Court even hint that its holding was meant to encompass cases in which no named plaintiff is found to be a proper representative of the class.

In *Crown, Cork & Seal*, Theodore Parker filed timely charges of racial discrimination with the EEOC after he was discharged by the defendant, Crown, Cork and Seal Company ("Crown"). He received a right-to-sue letter two months after two other discharged employees filed a broad-based class action suit challenging Crown's conduct with respect to hiring, job assignments, promotions, discharges, and disciplinary actions. Clearly a member of the asserted class in the already-filed action, Parker chose not to file his own suit upon receiving his right-to-sue letter.

Approximately two years after the class action suit against Crown was filed, the trial court denied the plaintiff's motion to certify the class, ruling that the named plaintiffs' claims were not typical of those of the entire class, that the named plaintiffs would

not be adequate representatives for the entire class, and that the class was not so numerous as to make joinder impracticable. Within 90 days of the trial court's order but almost two years after receiving his right-to-sue notice, Parker filed an individual action against Crown. Significantly, Parker asserted claims in his individual action that the named plaintiffs in the earlier-filed class action had standing to assert.

The district court granted summary judgment for Crown because Parker failed to file his action within the appropriate time after receiving his notice of right to sue. In affirming the Fourth Circuit's decision to reverse the trial court, the Supreme Court held that the commencement of the earlier-filed class action suspended the applicable statute of limitations for Parker. Because he filed suit in a timely manner after class certification was denied, the Court said Parker's action was not time-barred. The Court thus expanded on the *American Pipe* case, holding that the filing of a class action tolls the statute of limitations as to putative class members, whether they choose to intervene or to file individual actions following the denial of class certification. Again, the Court gave no hint that its holding would encompass cases in which the class representatives have no standing to assert claims which are raised in subsequent suits.

Under Title VII, there are two limitations periods that plaintiffs must satisfy to maintain suit. First, a complainant must file charges with the EEOC or state deferral agency within a prescribed period. Second, a Title VII plaintiff must file a complaint within ninety days of receiving a notice of right to sue from the EEOC. In *Crown, Cork & Seal*, the Court permitted tolling of the second limitations period for a plaintiff who satisfied the first period. The Court did not consider the question presented in this action: whether the first limitations period -- the EEOC filing period -- is tolled by the pendency of a class action. Perhaps, on other facts, the *Crown, Cork & Seal* holding could be extended to permit tolling of the first limitations period. Here, however, where Plaintiffs can point to no class member who filed a timely EEOC charge concerning hiring claims, this court

declines to so extend the Supreme Court's ruling. Just like Smith in the *Griffin* case, Plaintiffs cannot assert class-wide hiring claims here.

Even if the holding of *Crown, Cork & Seal* were applied to permit tolling of the EEOC filing period, the court's conclusion as to Plaintiffs' class claims would nonetheless be the same. Indeed, federal courts have been virtually unanimous in holding that the tolling rule announced in *American Pipe*, and extended in *Crown, Cork & Seal*, was not intended to permit putative class members to file subsequent class actions. As the Fifth Circuit suggested in *Salazar-Calderon v. Presidio Valley Farmers Ass'n.*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986), Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely. *See also Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987). Plaintiffs' class claims must, therefore, be dismissed.

Accordingly, it is ORDERED:

1. Defendants' 'Motion to Certify Class,' to Strike All Class Allegations from the Complaint, and to Dismiss All Class Claims from This Case (document 69) is hereby GRANTED.

2. Plaintiffs' Motion to Certify Class (document 12) is hereby DENIED.

3. All class claims are hereby DISMISSED WITH PREJUDICE.

DONE AND ORDERED this 20th day of March, 1992.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BRENDA ASHLEY, et al.

Plaintiffs,

v. TCA 91-40333-WS

THE STATE OF FLORIDA, et al.,

Defendants.

JIMMIE LEE SADDLER, et al.,

Plaintiffs,

v. TCA 90-40129-WS

THE STATE OF FLORIDA, et al.,

Defendants.

SAMUEL PLATT, et al.,

Plaintiffs,

v. TCA 88-40035-WS

THE STATE OF FLORIDA, et al.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

Before the court is Defendants' Motion to Dismiss, or Alternatively for Judgment on the Pleadings or Summary Judgment, Dismissing Plaintiffs' Individual Claims as Time-Barred (document 90). The parties were given notice that the motion would be treated as a motion for summary judgment that would be taken under advisement on August 28, 1992. *See* document 100.

Plaintiffs in this consolidated action challenge the correctional officer examination that defendants used for many years as an employment screening device. Each of the plaintiffs took and failed the examination sometime prior to 1982 when use of the examination was discontinued. Defendants contend that plaintiffs' suit is time-barred because none of the plaintiffs filed a charge of discrimination with 180 or 300 days of the date they received notice that they failed the correctional officers' examination. Plaintiffs have repeatedly argued that their suit is timely given the tolling principles announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). Because this court previously rejected their tolling arguments, *see* document 89, plaintiffs were advised that, in order to survive the defendants' motion for summary judgment, they must submit evidence that one or more of the plaintiffs filed a timely charge of discrimination. To date, no such evidence has been received.

Accordingly, it is ORDERED:

1. Defendants' motion for summary judgment, *see* document 90, is hereby GRANTED.

2. Plaintiffs' consolidated action is hereby DISMISSED WITH PREJUDICE because it is time-barred.

3. The clerk shall enter judgment accordingly.

DONE AND ORDERED this 31st day of August, 1992.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 92-2000, 92-2163 and 92-2996

Decided March 29, 1994

PENERS L. GRIFFIN, HENRY L. DEJERINETT,

Plaintiffs,

ALVIN SMITH,

Intervenor-Appellant

v.

LOUIE L. WAINWRIGHT, RAYMOND W. GEARY,

Defendants,

SAMUEL PLATT, DAVID BABER, ROMEO COZART, MARVIN JONES, MICHAEL OYEFESOBI,

Movants-Appellants,

PENERS L. GRIFFIN, HENRY L. DEJERINETT,

Plaintiffs-Appellants,

ALVIN SMITH, JOHN BUTLER,

Intervening Plaintiffs-Appellants,

v.

HARRY K. SINGLETARY, JR., STATE OF FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Defendants-Appellees,

LOUIE L. WAINWRIGHT, RAYMOND W. GEARY,

Defendants.

———————— ○ ————————

SAMUEL PLATT, MICHAEL ANDERSON, SANDRA ANDERSON, GARY BLACK, NELSON BROOKS, JR., LAURENE BROWN, TOMMIE BROWN, CURTIS CARTER, WILLIE CLARK, JULIUS HOPE, BILLY GIVENS, HAMES HAYNES, DAVIS HENDERSON, JIMMY HODORE, MAMIE JACKSON, GARY JONES, JAMES McNEALEY, IOLA RIVERS, JOHNNIE VANCE, DIANN WALKER, etc.,

Plaintiffs-Appellants,

v.

STATE OF FLORIDA, THE FLORIDA DEPARTMENT OF CORRECTIONS, HARRY K. SINGLETARY, JR., etc.,

Defendants-Appellees,

———————— ○ ————————

JIMMIE LEE SADDLER, TOM CARTER, JR., LILLIE MAE LEWIS, BLAKE T. MOORE, SR., SYLVIA JEAN FORWARD, ANTHONY BROWN, ROBERT HALLBACK, HENRY CHANDLER, WALTER EVERITT, JR., etc.

Plaintiffs-Appellants,

v.

STATE OF FLORIDA, THE FLORIDA DEPARTMENT OF CORRECTIONS, HARRY K. SINGLETARY, JR., etc.

Defendants-Appellees.

BRENDA ASHLEY, BERNICE HIZINE ATKINS, LOUISE BAKER, GARY BLACK, RONALD J. BAKER, SR., NELSON BROOKS, JR., BRENDA BROWN, YVONNE HAMPTON BROWN, HORACE CALHOUN, III, et al., etc.,

Plaintiffs-Appellants,

v.

STATE OF FLORIDA, THE FLORIDA DEPARTMENT OF CORRECTIONS, HARRY K. SINGLETARY, JR., etc.,

Defendants-Appellees.

Before DUBINA and CARNES, Circuit Judges, and MORGAN, Senior Circuit Judge

This case presents the question whether the pendency of a Title VII class action tolls the administrative charge-filing period for the class members when class certification is vacated because the representative failed to make a timely filing with the EEOC. We hold that it does toll the period for those wishing to bring individual suits but does not for those wishing to bring class action suits.

I. BACKGROUND

A. THE *GRIFFIN* LITIGATION

This lawsuit was filed in 1979 by Peners L. Griffin as an "across-the-board" class action, under Fifth Circuit precedent that allowed a plaintiff who alleged pervasive discrimination to raise claims, on behalf of a class, that were different from his individual claims. Griffin, whose individual claim was that the Florida Department of Corrections (FDOC) denied him several promotions and twice dismissed him because of his race, alleged in the class action that the defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (1981 & Supp. 1993), as well as 42 U.S.C.A. § 1983 (1981), by discriminating against blacks in recruiting, hiring, assigning jobs, and making promotions; by maintaining a racially biased workplace; and by requiring that applicants for correctional officer positions have a high school diploma and pass a written examination, both of which have a disparate impact on blacks.

In 1980, the district court granted Griffin leave to amend his complaint to add Henry Dejerinett as a party-plaintiff and a class representative. Dejerinett, who is black, had applied for a clerical position, for which the written exam was not required, and had not been hired. In 1981, the district court preliminarily certified a class of "all past, present, and potential black employees of the State of Florida Department of Corrections," after the parties stipulated that the allegations were common to that class.

In 1982, the defendants moved to vacate the class certification, based on the decision of the Supreme Court in *General Tel. Co. v. Falcon*, 457 U.S. 147, 157-61, 102 S.Ct. 2364, 2370-72, 72 L.Ed.2d 740 (1982), reversing a Fifth Circuit decision permitting an "across-the-board" class action. At that point, Alvin Smith, who had twice applied for a position as a correctional officer and twice been rejected, moved to intervene. Smith was first rejected because he did not have a high school

diploma. After getting a GED in 1981, Smith reapplied, but failed the written exam. The defendants contended that Smith could not be a class representative because he had failed to file a timely complaint with the EEOC. The district court denied the defendants' motion for summary judgment and allowed Smith to intervene. The court then granted partial summary judgment for the plaintiffs, finding that the FDOC's use of the written exam had a disparate impact on black applicants and was not justified by business necessity, thereby violating Title VII. The court left pending the issue of relief. In August 1982, shortly after the court granted summary judgment, the defendants ceased using the written examination.

In 1985, the district court certified for interlocutory appeal its decision to permit Griffin, Dejerinett, and Smith to serve as representatives for a class that included applicants claiming they were discriminated against by the FDOC's use of the written test. This Court granted the defendants permission to appeal, and, in *Griffin v. Dugger*, 823 F.2d 1476, 1494 (11th Cir. 1987), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988), vacated the district court's order certifying the class. We held that Griffin could not represent those with testing claims, because under *Falcon* he had no constitutional standing to assert a testing claim (not having been injured by the test), and because he did not meet the requirements of Rule 23(a) for representing those with testing claims. *Id.* at 1483-84 & n. 17 (citing Fed.R.Civ.P. 23(a)). Dejerinett, who applied for a clerical position, was not required to have a high school diploma or to take the written exam, and therefore also "lacked constitutional standing to assert a testing or hiring claim arising out of the [FDOC's] correctional officer application process." *Id.* at 1491. Smith, on the other hand, did have constitutional standing to assert a testing claim under Title VII, because he had failed the exam and had been rejected. *Id.* at 1492. However, because Smith had failed to file a timely charge of racial discrimination with the EEOC as required by 42 U.S.C.A. § 2000e-5(e) (1981 & Supp. 1983), we held that the district court erred in allowing Smith to intervene as a class representative. *Id.* Concluding that "[n]one of the named

plaintiffs . . . should have been allowed to represent the class of black correctional officer applicants with testing claims," we vacated the district court order certifying the class. *Id.* at 1494.

On remand, Griffin and Dejerinett moved for leave to amend their complaint in an effort to correct the defects found by the prior panel; Smith moved for leave to amend his intervenor's complaint, and five would-be intervenors (Platt, Baber, Cozart, Jones, and Oyefesobi) moved to intervene as class representatives for the vacated testing class. All moved for recertification of the class. The district court denied Platt, Baber, Cozart, Jones and Oyefesobi's motion to intervene, and vacated its order granting partial summary judgment on the testing issue as well as its order allowing Smith to intervene. The court also dismissed the high school diploma claim. Finally, the court denied Griffin and Dejerinett's motion to amend their complaint, denied Smith's motion to amend his intervenor's complaint, and denied the motion to recertify the class.

The court then entered final judgment for the defendants. The five movant-intervenors now appeal the district court's order denying them leave to intervene. Griffin, Dejerinett, and Smith appeal the order denying leave to amend their complaints and entering judgment for the defendants. Those appeals were given numbers 92-2000 and 92-2163, respectively.

B. THE *PLATT* LITIGATION

After this Court's decision in *Griffin*, several groups of those members of the former plaintiff class who had failed the examination filed actions challenging the use of the test for themselves and on behalf of the class that the district court had originally certified. The *Platt* group consisted of twenty plaintiffs who filed suit, relying, under the "single-filing rule," on the charge Platt had filed with the EEOC in March 1986. The nine plaintiffs in the *Saddler* case relied on a charge that plaintiff Henry Chandler had filed with the EEOC in 1987. The thirty-three

plaintiffs in the *Ashley* case all had filed charges with the EEOC shortly after the *Griffin* decision in 1987.

The defendants moved to strike the class allegations from the complaints in each of the three cases. The district court denied class certification in the *Platt* case and granted the motion to strike the class allegations in the *Saddler* and *Ashley* cases. The court consolidated the *Platt*, *Saddler*, and *Ashley* cases, and then granted the defendants' motion for summary judgment, on the ground that no plaintiff had filed a timely charge with the EEOC. All of the plaintiffs appealed, and their appeal was given number 92-2996. We will refer to all of the appellants in this group collectively as the *Platt* appellants or the *Platt* plaintiffs. Appeal number 92-2996 was consolidated with the two appeals from the *Griffin* litigation.

II. DISCUSSION

[1] The *Griffin* appellants contend that the district court erred in denying intervention to movant-intervenors Platt, Baber, Cozart, Jones, and Oyefesobi. The district court held that "[b]ecause none of these potential intervenors filed a timely charge of discrimination with the [EEOC] as required by the law of this case," they "stand in no better shoes than did Smith" under the prior panel opinion. We affirm that denial of intervention on the basis of the district court's reasoning.

[2] The *Griffin* appellants further contend that the district court erred when it denied Griffin and Dejerinett leave to amend their complaint. The district court reasoned that despite their efforts to amend their complaints, Griffin, Dejerinett, and Smith "continue to name no person who -- under the mandate of the appellate court -- would be a proper representative of persons with testing claims." We agree with the district court, and therefore affirm its denial of leave to amend.

Finally, the *Griffin* appellants argue that the district court erred in dismissing their challenge to the high school diploma requirement and in vacating the order granting intervention to Smith. Because no named plaintiff has standing to represent those

with diploma claims, and we have already held that Smith did not have standing to represent those with testing claims, we affirm the order of the district court dismissing the diploma claim and vacating the order granting Smith intervention.

A. THE NON-PIGGYBACK RULE FOR CLASS ACTIONS

[3] The *Platt* appellants contend that the district court erred in denying their motions to certify the class actions. The district court held that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely." We agree. "The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does *not* toll the limitations period for additional class actions by putative members of the original asserted class." *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) (emphasis added) (citing *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986), *and cert. denied*, 493 U.S. 821, 110 S.Ct. 79, 107 L.Ed.2d 45 (1989); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987)). The plaintiffs may not "piggyback one class action onto another," *Salazar-Calderon*, 765 F.2d 1351, and thereby engage in endless rounds of litigation in the district court and in this Court over the adequacy of successive named plaintiffs to serve as class representatives. This case illustrates the wisdom of the rule against piggybacked class actions. Fifteen years after the *Griffin* lawsuit was filed, the class action issues are still being litigated, and we decline to adopt any rule that has the potential for prolonging litigation about class representation even further.

B. THE PIGGYBACK RULE FOR INDIVIDUAL CLAIMS

We turn now to the individual claims, to which different law is applicable. The district court dismissed the *Platt* plaintiffs'

individual claims because none of them had filed a timely charge of discrimination with the EEOC after receiving notice that they had failed the written examination. The court rejected the *Platt* plaintiffs' argument that the charge-filing period was tolled during the pendency of the class action in the *Griffin* litigation, reasoning that nothing in *American Pipe & construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), or *Crown, Cork & Seal v. Parker*, 462 U.S. 345, S.Ct. 2392, 76 L.Ed.2d 628 (1983), suggested that the tolling rule those cases created "would encompass cases in which the class representatives have no standing to assert claims which are raised in subsequent suits." We review the district court's grant of summary judgment *de novo*. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993).

[4] The piggyback rule for individual claims is different from that for class actions. The Supreme Court has held that:

> "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." [*American Pipe*,] 414 U.S., at 554, 94 S.Ct., at 766. Once the statute of limitations has been tolled, it remains tolled for all members of putative class until class certification is denied.

Crown, Cork & Seal, 462 U.S. at 353-54, 103 S.Ct. at 2397-98. The district court reasoned that there is an exception to the tolling rule announced in *American Pipe* and *Crown, Cork & Seal* when the class action relied upon was decertified on grounds that no class representative had standing to bring the claim asserted in the individual suits. We disagree. Insofar as the individual claims are concerned, putative class members should be entitled to rely on a class action as long as it is pending. That reliance is particularly justified in this case, in which the district court certified a plaintiff class. As the Third Circuit explained in a similar situation:

> Reliance on the pendency of a certified class action is more reasonable than the reliance on an uncertified class action which [*American Pipe* and *Crown, Cork & Seal*] approve. The certification of the class should discourage, rather than encourage, the proliferation of filings of individual actions. The distinction which is urged on us would produce the very evil which the Court sought to avoid in *American Pipe* and *Crown, Cork & Seal*. Consistency with the policies reiterated in *Crown, Cork & Seal* requires that the tolling of the statute of limitations continue until a final adverse determination of class claims.

Edwards v. Boeing Vertol Co., 717 F.2d 761, 766 (3d Cir. 1983) (footnote omitted), *vacated on other grounds*, 468 U.S. 1201, 104 S.Ct. 3566, 82 L.Ed.2d 867 (1984), *reinstated*, 750 F.2d 13, 14 (3d Cir. 1984). If we were to hold otherwise, class members uncertain of the district court's standing analysis -- and there is much uncertainty in this area of the law -- "would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions -- precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal*, 462 U.S. 351, 103. S.Ct. 2396.

Nor are we convinced by the defendants' argument that tolling should not apply because the limitations period at issue in this case is an administrative rather than a statutory period. We have found no case adopting a rule based upon such a distinction. The only courts to have considered the question have concluded that

> [a]pplying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging

> all putative class members to file separate claims with the EEOC ....

Sharpe v. American Express Co., 689 F.Supp. 294, 300 (S.D. N.Y. 1988); *see also McDonald v. Secretary of Health & Human Serv.*, 834 F.2d 1085, 1092 (1st Cir. 1987) (holding that the principles of *American Pipe* tolling are "generally applicable" to administrative limitations periods, so that after a class action was decertified on appeal, the class members could "go forward from the point where they had left off during pendency of the class action" and exhaust their administrative remedies). As the Sixth Circuit has reasoned:

> So long as a class action is pending the employer[] is on notice of the claims of all putative class members. Once the class action ends, however, the employee is required to bring her individual claim to the attention of the employer by filing an administrative complaint with her EEOC counselor.

Andrews v. Orr, 851 F.2d 146, 150 (6th Cir. 1988). The class action filed in the *Griffin* litigation put the defendants on notice of adverse claims relating to their use of the written examination; they were made "aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class." *Crown, Cork & Seal*, 462 U.S. at 353, 103 S.Ct. at 2397. Tolling the administrative limitations period will discourage putative class members from needlessly multiplying actions without prejudicing defendants.

Therefore, we hold that the charge-filing period for the individual claims asserted in the *Platt* litigation was tolled during the pendency of the class action in *Griffin* -- that is, from the time the lawsuit was filed until this Court published its opinion vacating the order certifying the class on September 23, 1987.

III. CONCLUSION

The order of the district court granting summary judgment for the defendants in the *Platt, Saddler*, and *Ashley* cases is VACATED, and the cases are remanded so that the court may determine whether the individual plaintiffs filed timely charges which would permit them to continue their individual claims. The orders of the district court in *Platt, Saddler*, and *Ashley* cases denying class certification, and granting the defendants' motions to strike all class allegations, are AFFIRMED.

In the *Griffin* appeal, the order of the district court denying intervention to Platt, Baber, Cozart, Jones, and Oyefesobi, and refusing to recertify the class, is AFFIRMED. We AFFIRM the orders denying Griffin and Dejerinett leave to amend their complaint, denying Smith leave to amend his intervenors complaint, and refusing to recertify the class. We also AFFIRM the order of the district court; dismissing the high school diploma claim; vacating its order granting summary judgment on the testing issue; and vacating its order allowing Smith to intervene.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2000

PENERS L. GRIFFIN, ET AL,

Plaintiffs,

ALVIN SMITH,

Intervenor-Appellant,

SAMUEL PLATT,
DAVID BABER,
ROMEO COZART,
MARVIN JONES and
MICHAEL OYEFESOBI,

Movants-Appellants,

versus

HARRY K. SINGLETARY, JR.,
STATE OF FLORIDA DEPARTMENT
OF CORRECTIONS and
STATE OF FLORIDA,

Defendants-Appellees,

LOUIS L. WAINWRIGHT, ET AL,

Defendants.

No. 92-2163

PENERS L. GRIFFIN,
HENRY L. DEJERINETT and
ALVIN SMITH,

Plaintiffs-Appellants,

JOHN BUTLER,

Intervenor-Appellant,

SAMUEL PLATT, ET AL,
Movants,

versus

HARRY K. SINGLETARY, JR.,
STATE OF FLORIDA DEPARTMENT
OF CORRECTIONS and STATE
OF FLORIDA,
Defendants-Appellees,
LOUIS L. WAINWRIGHT, ET AL,
Defendants.

No. 92-2996

SAMUEL PLATT,
MICHAEL ANDERSON,
SANDRA ANDERSON,
GARY BLACK,
NELSON BROOKS, JR.,
LAURENE BROWN,
TOMMIE BROWN,
CURTIS CARTER,
WILLIE CLARK,
JULIUS HOPE,
BILLY GIVENS,
JAMES HAYNES,
DAVID HENDERSON,
JIMMY HODORE,
MAMIE JACKSON,
GARY JONES,
JAMES MCNEALY,
IOLA RIVERS,
JOHNNIE VANCE and
DIANN WALKER,
each individually and on behalf of

all other similarly situated,
DAVID BABAR,
DENNIS COHEN,
ROMEO COZART,
CASSAUNDRA FRANCIS DICKEY,
WILLIE EWING,
WILLIE HARPE,
MARVIN E. JONES,
MABLE KILPATRICK,
RONALD ANTHONY MARTIN,
SYLVIAN ANNE MARTIN,
MICHAEL OYEFESOBI,
EDDIE LEE RICHARDSON,
DALE ROGERS,
SHERRELL R. ROSIER,
MARILYN VIRGINIA SAUCIER,
EUGENE SHIVALIER,
NORMAN SMALL,
DOROTHY ANN SOLOMON,
ARBREA SPENCER,
AGNES MARIE STRANGE,
CHARLES H. THOMAS,
RUTHENE TUKES and
SHIRLEY WASHINGTON,
each individually and on behalf
of all other similarly situated,
Plaintiffs-Appellants,

versus

STATE OF FLORIDA, ET AL
Defendants.

* * * * * * * * * * * * * * * * *

JIMMIE LEE SADDLER, ET AL,
Plaintiffs-Appellants,

versus

HARRY SINGLETARY, ETC.,

Defendants.

* * * * * * * * * * * * * * * * *

BRENDA ASHLEY,

Plaintiffs-Appellants,

versus

STATE OF FLORIDA,

Defendants.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion March 29, 1994, 11th Cir., 1994, ____F.2d____).

Before: DUBINA and CARNES, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority

of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2000

PENERS L. GRIFFIN, ET AL,

Plaintiffs,

ALVIN SMITH,

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Movants-Appellants,

versus

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HARRY K. SINGLETARY, JR.,
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No. 92-2996

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each individually and on behalf of
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AGNES MARIE STRANGE,
CHARLES H. THOMAS,
RUTHENE TUKES and
SHIRLEY WASHINGTON,
each individually and on behalf
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Plaintiffs-Appellants,
versus
STATE OF FLORIDA, ET AL
Defendants.

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JIMMIE LEE SADDLER, ET AL,
Plaintiffs-Appellants,
versus

HARRY SINGLETARY, ETC.,
Defendants.

* * * * * * * * * * * * * * * * *

BRENDA ASHLEY,
Plaintiffs-Appellants,
versus
STATE OF FLORIDA,
Defendants.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING
( )

BEFORE: DUBINA and CARNES, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
United States Circuit Judge

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines that after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or

local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such informal endeavors may be made public by the commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2)

Supreme Court, U.S.
FILED
NOV 28 1994
OFFICE OF THE CLERK

No. 94-557

In The

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA, *et al.*,

Petitioners,

vs.

SAMUEL PLATT, *et al.*; JIMMIE LEE SADDLER, *et al.*; and BRENDA ASHLEY, *et al.*,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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87 pp

QUESTIONS PRESENTED

Whether members of a class certified under Rule 23 may rely upon the District Court's certification determination as tolling the statutory period for filing charges of discrimination under Title VII, even where a defect is later found in the class representative's capacity and the class is decertified.

PARTIES TO THE PROCEEDINGS

The petitioners in this case are the State of Florida and Harry K. Singletary, in his capacity as Secretary of the Florida Department of Corrections.

The respondents are Michael Anderson, Sandra Anderson, Brenda Ashley, Bernice Atkins, David Babers, Louise Baker, Ronald J. Baker, Sr., Gary Black, Nelson Brooks, Jr., Anthony Brown, Brenda Brown, Laurene Brown, Tommie Brown, Yvonne Hampton Brown, Horace Calhoun, III, Curtis Carter, Tom Carter, Jr., Willie Clark, Julius LeVonne Chambers, Henry Chandler, Dennis Cohen, Romeo Cozart, Cassaundra Francis Dickey, Ronald L. Ellis, Walter Everitt, Jr., Willie Ewing, Sylvia Jean Forward, Billy Givens, Robert Hallback, Willie Harpe, James Haynes, David Henderson, Jimmy Hodore, Julius Hope, Mamie Jackson, Gary Jones, Martin Jones, Marvin E. Jones, Mable Kilpatrick, Lillie Mae Lewis, Ronald Anthony Martin, Sylvia Anne Martin, Walter M. McGinniss, James McNealy, Blake T. Moore, Sr., Michael Oyefesobi, Samuel Platt, Eddie Lee Richardson, Iola Rivers, Dale Rogers, Sherrell R. Rosier, Jimmie Lee Saddler, Marilyn Virginia Saucier, Eugene Shivalier, Norman Small, Dorothy Ann Solomon, Arbrea Spencer, Agnes Marie Strange, Charles H. Thomas, Ruthene Tukes, Johnnie Vance, Diann Walker, and Shirley Washington.

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No. 94-557

In The

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October Term, 1994

STATE OF FLORIDA, *et al.*,

Petitioners,

vs.

SAMUEL PLATT, *et al.*; JIMMIE LEE SADDLER, *et al.*; and BRENDA ASHLEY, *et al.*,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondents, Michael Anderson, Sandra Anderson, Brenda Ashley, Bernice Atkins, David Babers, Louise Baker, Ronald J. Baker, Sr., Gary Black, Nelson Brooks, Jr., Anthony Brown, Brenda Brown, Laurene Brown, Tommie Brown, Yvonne Hampton Brown, Horace Calhoun, III, Curtis Carter, Tom Carter, Jr., Willie Clark, Julius LeVonne Chambers, Henry Chandler, Dennis Cohen,

Romeo Cozart, Cassaundra Francis Dickey, Ronald L. Ellis, Walter Everitt, Jr., Willie Ewing, Sylvia Jean Forward, Billy Givens, Robert Hallback, Willie Harpe, James Haynes, David Henderson, Jimmy Hodore, Julius Hope, Mamie Jackson, Gary Jones, Martin Jones, Marvin E. Jones, Mable Kilpatrick, Lillie Mae Lewis, Ronald Anthony Martin, Sylvia Anne Martin, Walter M. McGinniss, James McNealy, Blake T. Moore, Sr., Michael Oyefesobi, Samuel Platt, Eddie Lee Richardson, Iola Rivers, Dale Rogers, Sherrell R. Rosier, Jimmie Lee Saddler, Marilyn Virginia Saucier, Eugene Shivalier, Norman Small, Dorothy Ann Solomon, Arbrea Spencer, Agnes Marie Strange, Charles H. Thomas, Ruthene Tukes, Johnnie Vance, Diann Walker, and Shirley Washington urge the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 17 F.3d 356 (11th Cir. 1994), and is reproduced in the petitioners' appendix at 12a through 23a. The order denying petitioners' motions for rehearing and rehearing *en banc* is reported at 24 F.3d 256 (May 26, 1994), and is reproduced in the petitioners' appendix at 24a-28a. The order denying respondents' motion for rehearing is reproduced in the petitioners' appendix at 29a-32a.

JURISDICTION

The Court's jurisdiction has been invoked by petitioners under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

42 U.S.C. ' 2000e - 5(e)

[Reprinted in petitioners' appendix at 34a]

STATEMENT OF THE CASE

Petitioners' Statement of the Case is substantially correct, but has been given a decidedly heavy "spin." Our relevant departures are noted below.

We disagree strongly with the petitioners respecting the import of the Eleventh Circuit decision in *Griffin v. Dugger*, 823 F.2d 1476 (1987). None of the respondents were parties to that proceeding, and none have ever had the opportunity to litigate the factual basis of Mr. Griffin's standing or the timeliness of Mr. Smith's Title VII charge of discrimination. Respondents are all former members of the certified class in the Griffin litigation, who, after filing proof of claim forms at the invitation of the district judge, relied upon the class action to vindicate their claims. When the Eleventh Circuit vacated the class certification order in 1987, the respondents, and more than 500 other class members, acted promply to advance their individual claims by filing charges of discrimination with the Florida deferral agency and the Equal Employment Opportunity Commission (EEOC). In due course, the EEOC found all of the charges of discrimination filed within 300 days of the Eleventh Circuit opinion to be timely, and issued "cause" determinations. The respondents also filed the cases which make up this litigation, primarily in response to notices of right to sue issued by the United States Justice Department.

A. Facts Material To Consideration Of The Question Presented

Because these cases did not proceed to trial, the facts are those alleged in the complaints and submitted by affidavit during motion practice. These are set forth, below, in the discussion of the course of proceedings. Petitioners'

detailed foray into the evidentiary facts of the Griffin litigation is entirely misplaced. The Griffin case is the only one of the three cases consolidated for argument in the Court of Appeals which the petitioners chose not to bring before this Court. It is also a case in which none of the respondents participated.[1] We take specific issue with the follow aspects of the Griffin discussion by petitioner.

At page 4 of the petition, it is suggested that an EEOC investigator drafted portions of Mr. Griffin's charge of discrimination. There was no competent evidence to that effect. Petitioners note the charge did not identify the correctional officer exam in the challenge on "hiring" practices. The correctional officer exam was an integral part of the hiring procedure; a correctional officer applicant was required to pass the exam as a condition of employment consideration. The further implication that Mr. Griffin did not allow the EEOC an adequate opportunity to resolve his charge is incorrect. Years after filing his charge, when it had become clear the EEOC might never act, Mr. Griffin requested a notice of right to sue, and commenced his own litigation.

At page 5, footnote 2, petitioner inaccurately suggests that Alvin Smith's EEOC charge was dismissed as untimely. The assertion is simply incorrect. Mr. Smith failed the examination after the class was certified and filed his charge of discrimination while the class remained certified. This information was not communicated to the district judge, however, because the district court had already ruled Mr. Smith could rely upon the charge filed by Griffin, which

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[1] Four of the respondents attempted to intervene in the Griffin litigation, but intervention was not permitted by the district court.

"exhausted administrative remedies for the whole class and for all claims."[2] The charge was filed after the Court of Appeals had assumed jurisdiction of the interlocutory appeal which resulted in the *Dugger* decision referenced above. Without any explanation, the Eleventh Circuit panel later recited that "Smith never filed a timely charge." *Id.*, at 823 F.2d 1481 n. 8. Respondents believe the only reasonable explanation is that the panel followed binding precedent of the Eleventh Circuit, and refused to consider a factual issue not first submitted to the district judge. *See, McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491 (11th Cir. 1990)(*en banc*); and, *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976).[3]

Petitioners' assertion at page 5 that the merits of the correctional officer exam have never been litigated is at least misleading. The exam was the subject of extensive discovery and a motion for summary judgment by the plaintiffs. Petitioners attempted to defend the exam, but did not attempt to prove the exam's disparate impact was justified by business necessity. Petitioners' statement that it refused to litigate the "business necessity" of the exam because of its belief the plaintiffs had no standing is not a rationale that was articulated to opposing counsel or the district court. At a hearing which discussed the plaintiffs' motion for summary judgment on the issue, then-counsel for petitioners told the district judge in open court that this Court's decision in *Teal v. Connecticut* had deprived

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[2] This ruling of the district court appears at document number 150, page 6 of the district court record.

[3] Fifth Circuit decisions rendered prior to October 1981 are binding on Eleventh Circuit panels. *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981)(*en banc*).

petitioners of their only defense. Thereafter, the district court granted plaintiffs' motion for summary judgment, holding the exam had disparate impact and was not justified by business necessity. The merits of the exam were fully litigated, notwithstanding petitioners tactical legal decision to forego an attempt to prove business necessity.

At page 6, petitioners suggest there were three versions of the exam at issue. Without any explanation for the delay, this factual allegation was raised for the first time years after the district judge granted summary judgment finding the exam discriminatory. It has not been subjected to discovery or factual scrutiny by the trial court. It stands as a bare allegation of petitioners. Petitioners note they ceased use of the discriminatory exam in August 1982, shortly following the district court's finding that the exam violated Title VII.

B. Course Of Proceedings Below

At page 6, petitioners refer to the stipulation which provided the initial basis for class certification. The stipulation, in addition to providing factual agreement, provided that the instant petitioners agreed the class was properly certified under the law as it existed at that time, but preserved the right of petitioners to withdraw from the stipulation if the controlling law or material circumstances of the case changed. This Court's decision in *General Telephone Co. v. Falcon,* 457 U.S. 147 (1982), provided the initial basis for petitioners' withdrawal from the stipulation.

In addition, it is important to understand that the respondents were among approximately 1500 class members who filed proof of claim forms with the district court concerning the correctional officer exam. Literally hundreds

of these class members were injured by the exam while the class remained certified.

In addition to the events described by petitioners, the *Dugger* decision resulted in the following events. After the Eleventh Circuit decision on the interlocutory appeal, more than 600 former certified class members filed charges of discrimination with the State deferral agency and with the EEOC.[4] Shortly thereafter, Samuel Platt -- who had filed a charge of discrimination on March 25, 1986, seventeen (17) months before the class certification order was vacated on appeal -- and 19 other members of the previously certified class filed an action on behalf of themselves and the formerly certified class on February 11, 1988. Platt had filed his charge while the class remained certified; all of the other Plaintiffs had filed charges of discrimination within approximately 180 days of the panel decision decertifying the class.[5] Platt had received a notice of right-to-sue from the United States Justice Department and filed his action within 90 days of receipt of that notice. All of the Platt plaintiffs have received "cause" findings by the EEOC.

In July 1990, Jimmie Lee Saddler and seven other Plaintiffs received right-to-sue notices from the U.S. Department of Justice and initiated the *Saddler* litigation. They sued with plaintiff Henry Chandler, who failed the

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[4] In due course, the EEOC found that all of the charges filed within 300 days of the Dugger decision to be timely, and issued a determination of "cause" on behalf of approximately 600 persons, including most of the respondents. The EEOC later issued a determination of failure of conciliation.

[5] Because Florida is a deferral state, the 300-day charge-filing period is applicable to claims arising in Florida.

examination in 1978 and who filed an EEOC charge in October 1987, within 90 days of the *Dugger*, decision.

In November 1990, Brenda Ashley and 32 other former Griffin class members received notices of right-to-sue from the U.S. Justice Department, and initiated the *Ashley* litigation on January 5, 1991. Some of the *Ashley* plaintiffs had filed charges of discrimination within 90 days of the *Dugger* decision, most filed within 180 days of the decision, and all filed within 300 days.

The complaints in all three cases alleged that the Florida Department of Corrections had utilized, until the district court declared it illegal in the fall of 1982, a written examination to screen applicants for correctional officer employment, that the written examination was not validated, had a disparate impact upon black applicants for employment as correctional officers, and was not justified by any business necessity. It noted the examination had been declared a violation of Title VII in the Griffin litigation. All of the complaints alleged the factual basis for the original class representative's, in the Griffin litigation, standing to file a charge of discrimination challenging the employment examination.[6] The complaints alleged the petitioners continued to utilize the test for years after they discovered it had a severe disparate impact upon black applicants, knowing it had not been validated.

In addition to the petitioners' comments regarding the Eleventh Circuit panel's March 29, 1994, decision, it is important to note that the cases were remanded to the district

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[6] *See, EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980).

court to "determine whether the individual plaintiffs filed timely charges which would permit them to continue their individual claims." (App. 23a).

WHY THE WRIT SHOULD BE DENIED

ARGUMENT

Whether members of a class certified under Rule 23 may rely upon the District Court's certification determination as tolling the statutory period for filing charges of discrimination under Title VII, even where a defect is later found in the class representative's capacity and the class is decertified.

The Eleventh Circuit's decision in this case studiously follows this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 5354 (1974), and *Crown, Cork & Seal v. Parker*, 462 U.S. 345 (1983). These decisions have been repeatedly and harmoniously applied by most of the United States Courts of Appeals, without conflict among the circuits. Indeed, the petitioners' assertion, at page 9 of the petition, that the issue in this case is "of first impression" speaks loudly that there are no conflicts among the circuits and little reason for this Court to take jurisdiction. The petitioners argue the rule of *American Pipe* "has misled many federal courts ever since"[7], but identifies not one erroneous decision or even one instance where two circuits disagree on the application of the rule.

The petitioners' actual complaint is not with the development of law in the Eleventh Circuit, but with the concept of tolling during the pendency of a putative or certified class action, as developed by this Court. Petitioners

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[7] Petition at p.10.

argue the Title VII charge-filing period should not be tolled[8], but make no effort to distinguish the charge-filing period from the suit-filing period which this Court held in *Crown, Cork & Seal* is tolled by the pendency of a class action. Rather, petitioners attempt to raise the spectre of issues which have no arguable place in this litigation. Petitioners' cite Justice Blackmun's concurrence in *American Pipe* warning that attorneys should not be encouraged to frame class actions to "save members of the purported class who have slept on their rights."[9] 414 U.S. at 561. They cite Justice Powell's concurrence in *Crown, Cork & Seal* observing that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse."[10] 462 U.S. at 354. Yet, in this case, there is not even a hint of either abuse of the class action device or of the respondents sleeping on their rights. If anything, the respondents have been at risk in this case because of their forbearance.

This is a case which demonstrates the soundness of the tolling rule of *American Pipe* and *Crown, Cork & Seal.* Respondents participated in the Griffin litigation only as class members, relying upon the named plaintiffs to press their claims, the district judge's certification order, and the court reaffirmation of certification following this Court's decision in *Falcon.* They and approximately 1500 other class members filed proof of claim forms, but did not file an avalanche of EEOC charges while the class remained certified.[11] This forbearance was practiced even though

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[8] Petition at pp. 10-13.

[9] Petition at p. 11.

[10] Petition at p. 11.

[11] Respondent Platt filed an EEOC charge while the class remained certified, and ultimately received a notice of right to sue from the United States Justice Department.

literally hundreds of class members were injured by the discriminatory exam while the class remained certified. When the Eleventh Circuit decertified the class in 1987, most of the respondents, together with more than 500 other class members, promptly filed charges with the State deferral agency and the EEOC. In due course, the EEOC determined that all charges filed within the 300-day limitations period of 42 U.S.C. '2000e-5(e) were timely, and issued "cause" findings with respect to all such charges. Thereafter, the EEOC attempted to conciliate, and declared a failure of conciliation. Administrative remedies have been fully exhausted.

American Pipe was reaffirmed in *Crown, Cork & Seal Co. v. Parker*, holding:

> We conclude, as did the Court in American Pipe, that "the commencement of a class action suspends *the applicable statute of limitations* as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. 414 U.S. at 554, 94 S.Ct. at 766. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

462 U.S. at 353-354, (emphasis supplied).

As long as the claims in which they were interested were being prosecuted by the certified class representatives, respondents had no reason to file a charge, to intervene, or to file a lawsuit, and this Court's precedent counseled against any such action:

> Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely upon the named plaintiffs to press their claims. And a class complaint "notifies the defendants not only of the substantive claims brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."

Id., 462 U.S. at 352-353 (citations omitted).

There is good reason to believe the charge-filing period is an "applicable statute of limitations" under *Crown, Cork & Seal*. *United Airlines v. McDonald*, 432 U.S. 385 (1977), applied the tolling principle of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to intervenors in Title VII actions. Taking express note of the two limitations periods established by Title VII which are subject to tolling -- the charge filing period and the ninety-day limitation for filing suit after receiving a right-to-sue letter — 432 U.S. at 391-392 and n. 11 -- the Court allowed an individual who never had filed a charge of discrimination to intervene to appeal an order entered many years earlier denying class certification. The "critical fact" was that she acted "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representatives." *Id.* at 394. Even the dissenters in *McDonald* agreed that the filing of the class action tolled the limitations period for filing EEOC charges. In dissent, Justice Powell argued that McDonald should not be permitted to intervene for the purpose of appealing the order denying class certification, because she had allowed the charge-filing statute of limitation on her own claim to expire and thus had no interest in the litigation remaining.

He believed the charge-filing limitations period under Title VII was tolled by the filing of the class-action, but only until it was determined that a class action could not be maintained.

> A straight forward reading of *American Pipe* leads to the conclusion that the filing of the class action complaint in *Romasanto v. United Air Lines* tolled the statute of limitations for [McDonald to file her EEOC charge], but "only during the pendency of the motion to strip the suit of its class action character." Under the *American Pipe* rule, the statute of limitations [to file a charge of discrimination] had run against respondent by the time she attempted to intervene [at the conclusion of the suit, three years after Class certification had been denied].

Id., at 432 U.S. 397, 398.[12] By contrast, the respondents moved immediately on decertification of the class to file charges with the EEOC.

Numerous courts have recognized and applied the *Crown, Cork & Seal* equitable tolling rule, and several have had occasion to apply the rule expressly to the statute of limitation, or charge-filing limitation, of Title VII. In

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[12] In *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140 (1984), the Supreme Court made it clear that *American Pipe* tolling applies equally to putative and certified class actions. There, the Supreme Court rejected the plaintiffs' argument that it was useless to require notice of the opportunity to opt out to class members, since the limitations period on absent members claims had long since run, making the opportunity to opt out meaningless. The Court held the opt out opportunity remained meaningful, because "commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.*, 94 S.Ct. at 2152 n. 13.

Edwards v. Boeing Vertol Company, 717 F.2d 761 (3d Cir. 1983), the court applied the tolling rule to a separate suit brought by a member of a certified class, even though the original case never lost its class status. Edwards, who brought a separate action after the class claims in which he was interested lost, argued the pendency of the class action had tolled his personal limitations period, allowing him to attack discriminatory acts occurring years earlier than the date on which he filed his EEOC charge. 717 F.2d 764. The court agreed, taking note of the Supreme Court admonition in *Crown, Cork & Seal* that failing to accord tolling would result in "a needless multiplicity of actions -- precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 717 F.2d 766, quoting from 103 S.Ct. 2395-96.

> The principles of the *American Pipe* and *Crown, Cork & Seal* decisions are equally applicable to his case.
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> * * *
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> Boeing Vertol would have us distinguish *American Pipe* and *Crown, Cork & Seal* because in this case, unlike them, a class was certified and the claims tried. Such a distinction would make no sense. Reliance on the pendency of a certified class action is more reasonable than the reliance on an uncertified class action which those cases approve. The certification of the class should discourage, rather than encourage, the proliferation of filings of individual actions. The distinction which is urged on us would produce the very evil which the Court sought to avoid in *American Pipe* and *Crown, Cork & Seal*. Consistency with the policies reiterated in *Crown, Cork & Seal* requires that the tolling of the statute of limitations

> continue until a final adverse determination of the class claims.

Id., 717 F.2d 766. A similar result was reached in *Andrews v. Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988), in which the court held "that the thirty day limitations period for filing individual administrative complaints [against the United States Government] was tolled during the pendency of the earlier class actions, . . ." *Id.*, at 851 F.2d 149.[13] The decision of the district court in *Sharpe v. American Express Company*, 689 F.Supp 294 (S.D.N.Y. 1988), also succinctly summarizes the reasoning for extending the *American Pipe* "tolling doctrine to . . . class members who want to begin the administrative process by filing a claim with the EEOC." 689 F.Supp 300. Faced with the precise question, the court explained:

> As the *Parker* Court noted, "[l]imitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, . . . [citations omitted], but these ends are met when a class action is commenced." 462 U.S. 352, 103 S.Ct. at 2397. Applying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the

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[13] The court also discussed a question not presented by the facts of this case — whether successive class actions can effectively "piggy-back" one limitation tolling period on top of another, delaying implementation of the statute of limitation indefinitely. The factual scenario presented to the circuit court demanded the question be answered in the negative. Nevertheless, the issue is not presented here. No additional tolling was sought. Respondents originally filed new class actions, not to obtain additional tolling, but simply to litigate their claims with the efficiency provided by Rule 23.

> statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the EEOC and the respective state agencies in deferral states.

Id., 689 F.Supp 300.

In addition, this Court's treatment of the issue of equitable tolling of limitations periods in other kinds of administrative proceedings makes it reasonable that Title VII's charge filing period is an "applicable statute of limitations" subject to equitable tolling under *Crown, Cork & Seal*. Although the occasion to apply equitable tolling was somewhat different in *Bowen v. City of New York*, 106 S.Ct. 2022 (1986), the court tolled the limitations periods for both class members who never filed a claim, and for those whose claims had lapsed by the time the class action was filed. The court instructed that the proper approach is to "determine . . . whether equitable tolling is consistent with Congress' intent in enacting [the statute at issue], and whether tolling is appropriate on [the] facts." *Bowen*, at p. 2030. In this regard, the court found the SSA statute to be "unusually protective" of claimants. No less can be said of the statute involved in this case, Title VII. It is our national policy to eradicate arbitrary and discriminatory barriers to the exercise of equal employment opportunity for all inhabitants, and Title VII is the primary vehicle to that goal. Indeed, the Court's decision in *Crown, Cork & Seal* is itself an expression that equitable tolling is consistent with the Congressional intent in enacting Title VII.[14] Consistent with

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[14] The Eleventh Circuit has, itself, tolled the limitations charge-filing period where it found the underlying conduct to be "continuing" in

this Court's expression of Rule 23 policy, several Courts of Appeals have had occasion to expressly apply *Crown, Cork & Seal* to administrative limitations periods other than Title VII. In *McDonald v. Secretary of Health and Human Services*, 834 F.2d 1085 (1st Cir. 1987), the appeals court held it proper under *Crown, Cork & Seal* for the district court to revive claims of class members which had been dormant in the administrative pipeline during the pendency of the case, even though the class members had failed to appeal to the next administrative level. The court explained:

> While this case differs from *Crown Cork & Seal* and *American Pipe* in that the 60-day limitations periods pertained to administrative exhaustion, the principles discussed therein are generally applicable. In *Bowen*, 106 S.Ct. at 2029, the Supreme Court reaffirmed that section 405 (g)'s 60-day limitations period for *judicial* review is not jurisdictional, but rather constitutes a statute of limitations.

Id. at 1092. Likewise, in *Bailey v. Sullivan*, 885 F.2d 52, 65 (3d Cir. 1989), the court construed *Crown, Cork & Seal* to toll administrative limitations and exhaustion requirements. "We must decide then whether similar principles [as those expressed in *Crown*] can be used to justify waiver of administrative exhaustion for claimants who received an adverse determination but who did not request reconsideration, an ALJ hearing, or appeal to the Appeals Council." After reviewing the rationale of the decision, and the application of the principles in other administrative cases, the appeals court "conclud[ed] that the class entitled to

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nature, in *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992). A continuing violation of Title VII is another circumstance in which equitable tolling is merited.

readjudication of their claims because they were denied benefits . . . includes those claimants who failed to exhaust their administrative remedies. . . ."

The petitioners have relied heavily, but erroneously, on the Eleventh Circuit opinion in *Griffin v. Dugger*. The *Dugger* opinion does not even discuss the issue of tolling, or the import of either *American Pipe* or *Crown, Cork & Seal*. Likewise, the petitioner has attempted to rely upon and reason backward from what has become known as the "single filing rule." While there are similarities in the two equitable doctrines, the Court of Appeals in this case based its reasoning on tolling considerations, not on the "single filing rule."

As a matter of policy and good sense, a tolling rule — which has the purpose of encouraging forbearance in the filing of a multiplicity of claims — must not be unduly restrictive or technical, and must give potential claimants confidence that it will be reliably applied. Otherwise, claimants, and their attorneys, will always file every arguable claim in order to protect against the possibility the tolling rule may not be applied. Much of the efficiency of Rule 23 will be lost.

The writ should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 4 1995
OFFICE OF THE CLERK

No. 94-557

In The
Supreme Court of the United States
October Term, 1994

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On Petition for a Writ of Certiorari
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For The Eleventh Circuit

REPLY BRIEF

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QUESTION PRESENTED

Whether the 180 day statutory period allowed for filing administrative charges of discrimination with the EEOC was properly tolled for eight years during the pendency of an invalid and improperly certified class action brought in 1979 and vacated in 1987, under the rationale of this Court's 1974 tolling decision announced in *American Pipe and Construction Co. v. Utah*, as extended to Title VII cases by this Court's 1983 tolling decision announced in *Crown, Cork & Seal v. Parker*?

PARTIES TO THE PROCEEDING

The parties to the previous litigation in the *Griffin v. Dugger* and *Griffin v. Singletary* cases were plaintiffs Peners L. Griffin and Henry L. Dejerinett; intervenors Alvin Smith and John D. Butler; defendants below were Richard Dugger followed by Harry K. Singletary, in his official capacity as Secretary, Florida Department of Corrections; the Florida Department of Corrections; Louie L. Wainwright, individually; and Raymond W. Gearey, individually.

The parties to the consolidated *Platt*, *Ashley* and *Saddler* cases now before this Court are plaintiffs Samuel Platt, Michael Anderson, Sandra Anderson, Gary Black, Nelson Brooks, Jr., Laurene Brown, Tommie Brown, Curtis Carter, Willie Clark, Julius Hope, Billy Givens, James Haynes, David Henderson, Jimmy Hodore, Mamie Jackson, Gary Jones, James McNealey, Iola Rivers, Johnnie Vance, Diane Walker, Jimmy Lee Saddler, Tom Carter, Jr., Lillie Mae Lewis, Blake T. Moore, Sr., Sylvia Jean Forward, Anthony Brown, Robert Hallback, Henry Chandler, Walter Everitt, Jr., Brenda Ashley, Bernice Hizine Atkins, Louise Baker, Gary Black, Ronald J. Baker, Sr., Nelson Brooks, Jr., Brenda Brown, Yvonne Hampton Brown, Horace Calhoun, III, David Babers, Dennis Cohen, Romeo Cozart, Cassandra Dickey, Willie Ewing, Willie Harpe, Marvin E. Jones, Mable Kilpatrick, Ronald Anthony Martin, Sylvia Anne Martin, Michael Oyefesobi, Eddie Lee Richardson, Dale Rogers, Marilyn McPherson Saucier; Sherrell R. Rosier, Eugene Shivalier, Norman Small, Dorothy Ann Solomon, Arbrea Spencer, Agness Marie Strange, Charles H. Thomas, Ruthene Tukes, and Shirley Washington; the defendants here are the State of Florida, Florida Department of Corrections and Harry K. Singletary, in his official capacity as Secretary.

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This Court's review is necessary in order to correct an appellate court panel decision which will adversely affect the orderly administration of justice in the federal district and appellate courts.

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In The

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA, *et al.*,

Petitioners,

vs.

SAMUEL PLATT, *et al.*,; JIMMIE LEE SADDLER, *et al.*; and BRENDA ASHLEY, *et al.*,

Respondents.

REPLY TO BRIEF IN OPPOSITION

Petitioners Harry K. Singletary, Jr. and the State of Florida Department of Corrections hereby reply to the brief in opposition filed by the respondents in this cause.

OPINIONS BELOW

The 1987 opinion and decision of the Eleventh Circuit Court of Appeals is reported at 823 F.2d 1476 (*cert. denied*, 486 U.S. 1005). The two relevant orders of the district court on remand are reproduced in the appendix to the petition at pages 1a to 11a.

The opinion of the Eleventh Circuit Court of Appeals is reported at 17 F.3d 356 (March 29, 1994). A copy is reproduced in the appendix to the petition, at pages 12a to 23a. The order denying petitioners' suggestion for rehearing *en banc* is reported at 24 F.3d 256 (May 26, 1994). A copy is reproduced in the appendix to the petition, at pages 24a to 28a. The July 21, 1994 order denying respondent's petition for panel rehearing is reproduced in the petition appendix at pages 29a to 32a.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals to be reviewed was entered March 29, 1994. The order denying petitioners' suggestion of *en banc* rehearing was entered May 26, 1994. The final order denying respondents' petition for panel rehearing was entered July 21, 1994.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This is a Title VII case. The federal statute involved is Title VII of the Civil Rights Act of 1964, as amended, which was made applicable to the several states on March 23, 1972, and is

presently codified at 42 U.S.C. § 2000e *et seq.* Of particular importance here is the 180 day statutory period allowed for filing administrative charges under Title VII, presently codified at 42 U.S.C. § 2000e-5(e). A copy of the relevant portion of the statute is reproduced in the appendix to the petition at page 34a.

REPLY TO BRIEF IN OPPOSITION

I. RELEVANT FACTS

Petitioners first object to respondents' continued use of the word "decertified," when the record is clear that the underlying class action below was *vacated* in 1987 by the first appellate panel. Respondents are also aware that the earlier erroneous rulings about the test were *vacated*, and respondents should know that by operation of law there never was a valid testing issue ever raised in the *Griffin* litigation. The testing class action was *void ab initio*, and was *vacated* not decertified.

Respondents' opening assertion on page 4 of their brief in opposition, that "[n]one of the respondents were parties to [the earlier *Griffin* litigation], and none have ever had the opportunity to litigate the factual basis of Mr. Griffin's standing or the timeliness of Mr. Smith's Title VII charge of discrimination", is belied by their very next assertion, that "[r]espondents are all former members of the certified class in the Griffin litigation...." If the members of the *Griffin* "certified class" were not parties, what were they? And more importantly, if respondents were not parties to the *Griffin* case, how do they have standing to be here today?

Respondents have always claimed that they have standing as parties; they did so by filing their motions to intervene as parties in the *Griffin* case after the defeat of their class claim in 1987; by filing their post-appeal motions to amend the *Griffin* complaint and to add some class members as parties; by filing

these three successor class actions and therein repeatedly relying upon (some of) the favorable facts found by the appellate court in the 1987 decision *vacating* their earlier class action; and by repeatedly asserting that as former class members they are entitled to the benefits of this Court's "generous" tolling rules at issue here.

It is far too late in the day for respondents to attempt to avoid the law of this case by claiming not to be parties to it; respondents are barred by the doctrines of *res judicata, collateral estoppel*, or both, from relitigating issues that were lost in the district court or in the first *Griffin* appeal. *See, Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert denied*, 486 U.S. 1005 (1988).

On page 5 of their brief in opposition, respondents attempt to avoid the finding of the 1987 *Griffin* appellate panel, i.e. that Alvin Smith's EEOC charge was untimely filed, by asserting that the district court never considered that issue. That assertion is erroneous. The district court, when faced with defendants' clear proof of Smith's untimely charge, chose to avoid or ignore it and erroneously ruled that Smith could nevertheless intervene based upon the single-filing rule announced in *Otis v. Crown Zellarbach Corp.*, 398 F.2d 496 (5th Cir. 1968). *See, district court record*, document 150, page 6.

Then during the 1987 appeal, the respondents' counsel filed a copy of Alvin Smith's EEOC charge (which on its face is shown to be untimely filed); the panel correctly held that it was untimely. The appellate court then squarely addressed the single-filing rule issue, reversed the district court and *vacated* the class action for want of a proper class representative. *See, Griffin v. Dugger, supra*, 823 F.2d at 1492-1494. Respondents cannot avoid that clear law of this case by claiming not to know the basis upon which the 1987 panel found Smith's charge untimely.

Notwithstanding respondents' beliefs expressed on page 6 of their brief in opposition, questioning whether or not "the merits of the correctional officer exam were [ever] litigated," the record below clearly shows that the test (there were three different versions) was never requested through discovery; was never produced by the defendants below (because it was not their test); has never been subjected to any EEOC review; was never introduced as evidence; was never reviewed by the district court prior to the 1982 summary judgment finding that plaintiffs' statistics showed it had a disparate impact; and thus the testing issue still awaits a proper party plaintiff having standing to litigate the merits of the test(s), including defendants' proof of its 1976 validation.

Rather than litigating the merits of the test and its 1976 validation in the *Griffin* litigation, petitioners have steadfastly asserted that the original plaintiffs have always lacked Article III standing to raise the testing claim, and that no one else among the many intervening class members has ever filed a timely EEOC charge or otherwise exhausted their administrative remedies. Plaintiffs first said that they had Article III standing; the appellate court disagreed. Plaintiffs next said that Alvin Smith could rely upon the single-filing rule to intervene and rescue the testing claim; the appellate court disagreed. Respondents (and the second appellate panel below) now say that they can come forward many years later, file extremely late EEOC charges, avoid all prior error, ignore all adverse rulings and circumvent the law of this case by an extension and application of the *judicial* tolling rules to *administrative* proceedings. Petitioners disagree.

On page 7 of their brief in opposition, respondents attempt to discredit the fact that there were three different versions of the correctional officer test used by the defendants below, from 1969 until August 1982. The third version was created and validated in 1976 by the Florida Department of Administration (FDOA) which was not a party to the *Griffin* litigation. Florida law required the defendants to administer the FDOA's test, which they did until the

district court declared that it had a disparate impact in August 1982. The test was abolished by FDOA in 1983.

In 1986, after several unsuccessful attempts to limit the testing class to those members who took the third version (1976 to August 1982), plaintiffs and defendants below agreed to notify the class and also seek permission to appeal the issues of standing and failure to file timely EEOC charges. Both sides then told the Eleventh Circuit, when seeking the interlocutory appeal, that if defendants were correct, the litigation would be over; defendants were correct, but plaintiffs are still litigating.

II. Course of Proceedings Below

During the damage phase of *Griffin*, defendants agreed to notice the entire class as asserted by plaintiffs (March 1972 to August 1982) in return for plaintiffs' agreement allowing defendants to seek interlocutory appeal pursuant to 28 U.S.C. §1292(b). These respondents appeared in the *Griffin* litigation then, as class members seeking relief, most alleging failing the test prior to October 15, 1979, when the *Griffin* litigation began. Of the estimated 1500 persons filing timely claim forms in the district court, some 800 later filed boiler-plate, consolidated EEOC charges, after the Eleventh Circuit vacated the class action (in September 1987). EEOC then merely sat on the late charges while plaintiffs sought reconsideration, and then sought review in this Court. EEOC appeared as *amicus* in the Eleventh Circuit proceedings seeking rehearing, but did not appear in this Court.

After this Court denied review in 1988, EEOC declared that (most of) the late-filed charges were timely, noted that the district court had earlier found disparate impact (that ruling was vacated), and issued a "cause" determination. Conciliation was declared a failure by defendants below, who prefer to litigate these legal issues in competent forums.

On page 9, respondents candidly acknowledge their post-trial, post-appeal attempts to resurrect the defeated *Griffin*

litigation by bringing these three successor class actions, and by attempting to relitigate the issues lost by their original class representatives. Petitioners were successful in the district court, which dismissed all class and individual claims for the very same reasons that the Eleventh Circuit had done so in 1987: failure to file timely EEOC charges. The district court was correct.

However, the second panel opinion has now sided with respondents, who believe that the temporal existence of a spurious, invalid and finally vacated class action can nevertheless toll the statutory time for filing EEOC charges for decades. Petitioners agree with the district court.

III. Reply to the Argument

It is apparent that the gravamen of petitioners' position has been lost upon the respondents. The concept of tolling by this Court has always been meant for and applied to *judicial* actions, not to *administrative* proceedings. Tolling is not ever necessary in the EEOC's administrative arena, because the single-filing rule can and does act to *excuse* the filing of charges in proper cases. *See, Otis v. Crown Zellarbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

Respondents' attempt to extend this Court's *judicial* tolling rules and enlarge the EEOC's statutory charge-filing period is necessary to their case, only because the Eleventh Circuit has eliminated all hope of their reliance upon the single-filing rule. Respondents cannot avoid the law of this case, so they are seeking some new law here.

In every single case cited and relied upon by respondents, the district and appellate courts below have confused the issue of judicial tolling with its administrative counterpart, the single-filing rule. *See, Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); *Bailey v. Sullivan*, 885 F.2d 52 (3rd Cir. 1989); *Bowen v. City of New York*, 106 S.Ct. 2022 (1986); *Lo Re v. Chase Manhattan Corp.*,

431 F.Supp. 189 (S.D. N.Y. 1977); *Edwards v. Boeing Vertol Co.*, 717 F.2d 761 (3rd Cir. 1983); *McDonald v. Secretary of Health and Human Services*, 834 F.2d 1085 (1st Cir. 1987); *Sharpe v. American Express Co.*, 689 F.Supp. 294 (S.D. N.Y. 1988). Such apparent confusion may be seen as necessary in the circuits that have rejected or have not followed the old Fifth Circuit's lead in *Otis v. Crown Zellarbach, supra*, 398 F.2d 496. But the single-filing rule is still alive and well in the Fifth and Eleventh Circuits, and deserves to become the law of the land by clear announcement of this Court, here and now. *See, Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981); *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993); *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376 (11th Cir. 1983); *Hill v. MARTA*, 841 F.2d 1533 (11th Cir. 1988); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982); *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195 (5th Cir. 1984) *cert. denied* 469 U.S. 1073 (1984).

This issue is a very important one, affecting the orderly administration of justice in the several federal district and appellate courts. It was presented before by the *Griffin* plaintiffs and some of these respondents as *amici* to the Eleventh Circuit back in 1987, upon their motions seeking rehearing; and it was presented in 1988 to this Court, which denied review at that time.

This important issue is now back, giving this Court a clear opportunity to take it up squarely, hear all sides thoroughly, and decide the case for the benefit of all federal courts in need of this Court's wisdom and guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1995